DMCD Museum Associates Sdn Bhd v Shademaker (M) Sdn Bhd (No 2)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–426 OF 1997
KAMALANATHAN RATNAM J
21 JUNE 1999

Contract *— Building contract — Termination — Service of notice — Whether service of notice by hand is valid — Construction of provision governing service of notices*

The plaintiff appointed the defendant as sub-contractor for the proposed construction and completion of the Petrosains, Levels 4 and 5 Petronas Twin Towers, KLCC, Kuala Lumpur. A notice of default dated 23 May 1997 was issued to the defendant by the plaintiff requesting the defendant to remedy all defaults stated therein within 14 days from the date of receipt of the notice of default. The plaintiff later issued a notice of termination dated 10 June 1997 which was sent 'by hand'. The defendant replied by way of a letter dated 10 June 1997 refusing to accept the plaintiff's repudiation of the sub-contract. The defendant applied pursuant to O 33 r 2 of the Rules of the High Court 1980 that a preliminary point of law be determined prior to the trial of the action. The issue was whether the termination of the sub-contract by the plaintiff was unlawful in view of the termination notice dated 10 June which was sent to the defendant by hand instead of by registered post.

Held, preliminary objection is dismissed:

(1) Clause 32 of the sub-contract allows for the notice which must be in writing to be 'served upon' the sub-contractor at the address given. It is only when no such address is given or if there is a change of address of the sub-contractor and he fails to give notice of such change, the court will deem that it has been properly sent to the sub-contractor when it is addressed by registered post to the latter's last known address (see p 246D–G); *Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd* [1998] 6 MLJ 80 distinguished.

(2) So long as the sub-contractor had received the letter dated 10 June 1997 which was despatched by hand, and indeed as he had in fact immediately replied on the same day in refusing to accept the plaintiff's termination of the sub-contract, it is a too late for the defendant to take up this issue even assuming the defendant is right to take up this argument at all (see p 246H–I).

[Bahasa Malaysia summary

Plaintif telah dilantik defendan sebagai sub-kontraktor untuk cadangan pembinaan dan penyiapan Petrosains di Tingkat 4 dan 5 Menara Berkembar Petronas, KLCC Kuala Lumpur. Suatu notis keingkaran bertarikh 23 Mei 1997 telah dikeluarkan terhadap defendan oleh plaintif, meminta defendan untuk meremedikan semua

keingkaran seperti yang dinyatakan di dalam masa 14 hari dari tarikh penerimaan notis keingkaran. Kemudian, plaintif mengeluarkan suatu notis penamatan bertarikh 10 Jun 1997 yang diserah 'dengan tangan'. Defendan telah membalas melalui suatu surat bertarikh 10 Jun 1997 dan enggan menerima pembatalan plaintif berkenaan dengan sub-kontrak tersebut. Defendan telah memohon menurut A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 bahawa suatu bantahan awal ditentukan sebelum perbicaraan tindakan tersebut. Isu adalah sama ada penamatan sub-kontrak tersebut oleh plaintif adalah tidak sah memandangkan notis penamatan bertarikh 10 Jun diserah dengan tangan kepada defendan dan bukan melalui pos berdaftar.

Diputuskan, menolak bantahan awal:

(1) Fasal 32 sub-kontrak tersebut membenarkan notis bertulis diserah kepada sub-kontraktor di alamat yang diberikan. Hanya apabila tiada alamat diberikan atau terdapat perubahan alamat sub-kontraktor tersebut dan beliau gagal untuk berikan notis mengenai perubahan tersebut, mahkamah akan menganggap bahawa ia telah dihantar dengan wajar kepada sub-kontraktor apabila dialamatkan secara pos berdaftar kepada alamat terakhir sub-kontraktor tersebut (lihat ms 246D–G); *Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd* [1998] 6 MLJ 80 dibeza.

(2) Selagi sub-kontraktor telah menerima surat bertarikh 10 Jun 1997 tersebut yang telah dihantar dengan tangan, dan sememangnya beliau telah membalas dengan segera pada hari yang sama dengan menolak penamatan plaintif berkenaan dengan sub-kontrak tersebut, adalah terlalu lewat bagi defendan untuk membangkitkan isu ini, itupun jikalau defendan adalah betul dalam membangkitkan hujahan ini langsung (lihat ms 246H–I).]

Notes

For cases on building contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1696–1815.

Cases referred to

Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd [1998] 6 MLJ 80 (distd)

V Pradhan (*SS Tieh* with him) (Paul Ong & Associates) for the applicant.
CW Teo (*Khaw & Hussein*) for the respondent.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

By virtue of a Design and Build contract dated 13 December 1996, Kuala Lumpur City Centre Berhad appointed DMCD Incorporated and the

A plaintiff as the main contractors for the design, construction, commissioning and completion of the Petronas Discovery Centre (Petrosains) project. By a letter of award dated 5 February 1997, the plaintiff appointed the defendant as sub-contractor for the proposed construction and completion of the Petrosains, Levels 4 and 5 Petronas Twin Towers, KLCC, Kuala Lumpur, for the sum of RM25,721,508.18. The plaintiff subsequently compiled four volumes of the contract documents containing all the terms and conditions governing the rights and liabilities of both parties under the sub-contract. These now form the contract between the plaintiff and the defendant.

A notice of default dated 23 May 1997 was issued to the defendant by the plaintiff requesting the defendant to remedy all defaults stated therein within 14 days from the date of receipt of the said notice of default failing which the plaintiff would terminate the sub-contract. The said notice of default was despatched 'by hand'. In response to the said notice of default, the defendant, by letter dated 27 May 1997 denied the alleged defaults. After much correspondence the plaintiff issued a notice of termination dated 10 June 1997. The said letter was also sent 'by hand'. The defendant replied by way of a letter dated 10 June 1997 refusing to accept the plaintiff's repudiation of the sub-contract.

On 13 June 1997, an ex parte interim injunction was granted by this court restraining, inter alia, the defendant from being on the construction site.

The application

This is the defendant's application pursuant to O 33 r 2 Rules of the High Court ('the RHC')1980 that a preliminary point of law be determined prior to the trial of this action.

The preliminary issue

The preliminary issue in question is, inter alia, whether the termination of the sub-contract by the plaintiff was unlawful in view of the non-compliance by the plaintiff as to the mode of service of the termination notice dated 10 June 1997 in that the termination notice in question was sent to the defendant by hand instead of by registered post as provided for under the terms of the sub-contract.

Findings of the court

The defendant was of the view that if I accepted its submission that the notice of termination dated 10 June 1997 which was despatched by hand is bad in law as not having conformed with cl 32 of the sub-contract which requires service by registered post, then there would be no need for this Court to go through a full-bloomed trial with 19 volumes of common agreed bundles of documents to wade through and for the court to listen to eight witnesses for the plaintiff and six for the defendant. If I was with the defendant on this submission the plaintiff's claim would be dismissed and the matter referred to the learned senior assistant registrar for assessment of

damages. The defendant relied on *Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd* [1998] 6 MLJ 80 where my learned brother, Nik Hashim J said at p 87 as follows:

> ... The contract in the instant case is a standard form contract which the plaintiff and the defendant chose to use, and as such, they are bound by its provisions. Clause 25(1) clearly stipulates that the architect's default notice and the defendant's notice of termination are to be given to the plaintiff by 'registered post or recorded delivery'. Since recorded delivery service is non-existent in Malaysia, it is therefore to be disregarded. Service by hand is not a recorded delivery. Neither is it provided for in the contract. Thus, the only service that is left available and practical which is required by cl 25(1) is by means of registered post. So following the cases of *Ericksson* and *Central Provident Fund Board* and the preferred view of Prof Vincent Power-Smith, I hold that the mode of service by registered post should be strictly observed. It is a mandatory requirement and hence obligatory on the part of the respondent to follow it. Failure to comply with the prescribed mode of service is fatal. Service by any other means other than by registered post is invalid.

The relevant clause dealing with notices and claims in respect of this sub-contract, is cl 32.1. The said clause reads as follows:

> Notices and claims
>
> All notices shall be in writing. The sub-contractor shall notify the main contractor and the employer's representative an address where written notices and instructions of the main contractor and the employer's representative under the sub-contract may be served upon him and shall inform the main contractor and the employer's representative of any change in his address. In the event of the sub-contractor failing to notify the main contractor and employer's representative of such an address or any change in his address, such written notices and instructions shall be deemed to have been served upon the sub-contractor if they are sent to him by registered post to the address stated in the sub-contract or if they are left at his office on the site and an acknowledgement of receipt thereof is obtained from or on behalf of the sub-contractor.

It is apparent therefore that this clause allows for the notice which must be in writing to be 'served upon' the sub-contractor at the address given. It is only when no such address is given or if there is a change of address of the sub-contractor and he fails to give notice of such change, the court will deem it that it has been properly sent to the sub-contractor, so long as it is addressed by registered post to the last known address as stated in the sub-contract. There is a clear difference between this case and in *Fajar Menyensing Sdn Bhd.*

Besides it is my view that so long as the sub-contractor has received the letter dated 10 June 1997 which was despatched by hand, and indeed as he had in fact immediately on the same day, replied the said letter by refusing to accept the plaintiff's repudiation or termination of the sub-contract, it is my judgment that it is a bit too late in the day for the defendant to take up this issue even assuming the defendant is right to take up this argument at all, which I have already held he cannot, because of the explicit provision for service of the notice on him. In fact the way the clause is worded it would seem that the only mode of informing the defendant where the address is

known, is by service upon him and to my mind such a mode of service, clearly includes service by hand.

The preliminary objection is hereby dismissed with costs.

Preliminary objection dismissed.

Reported by Benjamin Yong